



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 04, 2022

Matthew C. Alvarez
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150 Post Street, Suite 405
San Francisco, CA 94108

Re: Your Request for Informal Assistance
Our File No. I-21-163

Dear Mr. Alvarez:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the “Act”).¹ Note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice. Also, as you have asked questions regarding the general application of Section 85501, we must limit our response to informal assistance.²

QUESTION

May San Jose Mayor Sam Liccardo open up and control a committee that will raise and spend money on independent expenditures to support other candidates in the upcoming 2022 elections given the Sacramento County Superior Court decision in *Charles R. “Chuck” Reed, et al. v. Fair Political Practices Commission* (Reed case) finding Section 85501 unconstitutional on its face and enjoining the Commission from enforcing that provision of the Act in a manner inconsistent with the rights protected by the First Amendment?

CONCLUSION

Despite the court’s decision in the *Reed* case, the Commission does not have the authority to declare Section 85501 unconstitutional or unenforceable because the *Reed* case was decided at the trial court level. (See article III, section 3.5 of the California Constitution.) As previously advised, if a candidate-controlled committee elects to make independent expenditures pursuant to the *Reed* case, the independent expenditures would need to be made from the account established to support the candidate’s own election to public office and subject to the jurisdiction’s applicable contribution

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18109 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

limits.³ Whether this would violate the San Jose's local ordinance is not a determination the Commission can make – San Jose's interpretation of its local ordinance is outside the purview of the Act. Therefore, any determination in this regard must be made by San Jose.

FACTS AS PRESENTED BY REQUESTER

Mayor Sam Liccardo was first elected Mayor of San Jose in 2014 and was re-elected in 2018. His second and final term of office ends in December 2022 as San Jose law prohibits him from seeking a third term. Mayor Liccardo does not presently have plans to run for any other elected office and does not control any committees towards that purpose.

Pursuant to San Jose law, Mayor Liccardo had to close, and did close, his Mayoral campaign committee within six months of his re-election in 2018. (S.J. Muni. Code section 12.06.290(E).) Under state law, state candidates are not required to ever close their campaign committees while they are in office. San Jose, on the other hand, effectively requires candidates to shutter their campaign committees within 180 days after the general election, because candidates are not allowed to raise money into their campaign accounts after that time period. (*Ibid.*) Mayor Liccardo therefore does not have his campaign committee any longer and has not had one in almost three years. In sum, Mayor Liccardo does not control any campaign, legal defense, officeholder, ballot measure or other political committees.

At this time, he would like to set up and control a committee which will raise and spend funds on independent expenditures to support and oppose state and local candidates in San Jose and Santa Clara County, other than himself, during the 2022 election cycle, and perhaps beyond.

To your knowledge, the last time a state or local elected official controlled an independent expenditure PAC, it was Mayor Liccardo's predecessor - Mayor Chuck Reed. At the time of Mayor Reed's activity, Section 85501 prohibited an elected official from controlling a committee which makes independent expenditures, and the Commission pursued and fined him in an enforcement matter for violation of this statute. In response, Mayor Reed sued the Commission claiming that the statute was unconstitutional. The trial court ultimately found Section 85501 to be unconstitutional on its face and enjoined the Commission from enforcing that provision of the Act in a manner inconsistent with the rights protected by the First Amendment. (See the *Reed* case.)⁴

ANALYSIS

The Commission Cannot Declare Section 85501 Unenforceable or Unconstitutional.

Initially, it is helpful to consider the legal significance of the *Reed* case. Even though the trial court decision found Section 85501 unconstitutional on its face and enjoined the Commission from enforcing that provision of the Act, the Commission lacks the authority to declare the statute

³ See *Downing* Advice Letter, No. A-14-148.

⁴ *Charles R. "Chuck" Reed, et al. v. Fair Political Practices Commission (Reed case)*, Sacramento County Superior Court, Case No. 34-2013-80001709, decision filed April 2, 2014.

unenforceable or unconstitutional. Specifically, article III, section 3.5 of the California Constitution states, in part:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
- (b) To declare a statute unconstitutional;

The effect of this prohibition is that “agencies must continue to apply statutes despite constitutional doubts unless and until an appellate court (not a trial court) invalidates the statutes.” (Asimow et al., Cal. Practice Guide: Administrative Agencies (The Rutter Group 1997) ¶ 2:186.)

Here, Section 85501 expressly prohibits a candidate-controlled committee from making independent expenditures and contributing “funds to another committee for the purpose of making independent expenditures to support or oppose other candidates.” As mentioned, when that prohibition was challenged in 2014 by former San Jose Mayor Reed, the trial court decision found Section 85501 unconstitutional on its face and enjoined the Commission from enforcing that provision of the Act in a manner inconsistent with the rights protected by the First Amendment.

While it is true that the trial court in the *Reed* case declared Section 85501 to be unconstitutional and granted an injunction prohibiting the Commission from enforcing Section 85501 in a manner inconsistent with the rights protected by the First Amendment, there has been no appellate court determination to this effect and the Commission cannot declare Section 85501 unconstitutional. We therefore lack the authority to issue advice in contradiction of the express statutory restriction. Likewise, the Commission is unable to provide advice regarding the scope of the *Reed* decision or the injunction granted by the trial court as the legal interpretation and precedential value of the decision and injunction are outside of the boundaries of the Act. Accordingly, we can merely note that the legislature did not rescind or amend Section 85501 subsequent to the *Reed* decision, and no appellate court has declared Section 85501 unconstitutional. Candidates relying on the *Reed* decision may wish to consult their legal counsel regarding the presidential value of the decision and injunction.

Whether Mayor Liccardo Would Violate San Jose’s Local Ordinance By Setting Up and Controlling a Committee for the Sole Purpose of Raising and Spending Funds on Independent Expenditures to Support and Oppose Other Candidates Is Not a Determination the Commission Can Make.

Subsequent to the *Reed* case, the Commission was asked whether candidate-controlled committees could now make independent expenditures to support or oppose other candidates. (*Downing* Advice Letter, No. A-14-148.) The *Downing* letter made no assertions regarding the enforceability or constitutionality of Section 85501 but advised that if candidate-controlled committees elected to make independent expenditures, existing law would require such expenditures “be made from the one campaign contribution account established under Section 85201 and from funds raised subject to contribution limits under Sections 85301 and 85302 or any other applicable contribution limit imposed upon the candidate by a local jurisdiction.”

You state “the *Downing* advice letter relied on the FPPC’s ‘consistent interpretation’ that the ‘one bank account rule’ prohibits a candidate from opening any other type of committee ‘unless expressly permitted otherwise.’” However, the *Downing* letter more broadly advised how candidate-controlled committees that elect to make independent expenditures to support or oppose other state candidates should do so by considering, and staying within the legal parameters of, the express provisions of other relevant laws under the Act, including Section 85201, directly pertaining to candidates.⁵

Here, Mayor Liccardo is still a candidate just as former Mayor Reed was found to be a candidate in the *Reed* case. (See *Reed* case at pp. 3-4 [under Sections 82007 and 84214 as well as Regulation 18404(d)(1), candidates retain their status as candidates until their filing obligations are terminated, which occurs when all controlled committees are terminated *and* the individual has left office].) You state that Mayor Liccardo, who is in his second and final term of office, has no plans to run for any other elected office and was required to terminate his Mayoral campaign committee pursuant to a local ordinance. Notwithstanding this, as a current candidate, Mayor Liccardo is required to comply with all existing laws under the Act pertaining to candidates until he leaves office. For example, as indicated above, any contribution (even if intended to be used solely for an independent expenditure) is a reportable contribution to Mayor Liccardo,⁶ and Section 85201(a)&(c) expressly requires that these contributions be deposited into one campaign committee. Therefore, given these express provisions under the Act, a candidate is not authorized to deposit such contributions into an independent expenditure committee.

You further state that Mayor Liccardo was required by San Jose law (S.J. Muni. Code section 12.06.290(E)) to close his Mayoral campaign committee within six months of his re-election in 2018, which he did, because candidates are not allowed to raise money into their campaign accounts after that time period. He would now like to make independent expenditures to support and oppose other state and local candidates in San Jose and Santa Clara County but does not have the campaign account contemplated in the *Downing* Advice Letter; therefore, he would like to set up and control a campaign committee under the Act for the sole purpose of raising and spending funds to do so. Whether this would violate the San Jose ordinance is not a determination the Commission can make; instead, any determination in this regard must be made by San Jose.⁷

⁵ We note that the trial court in the *Reed* case considered only the constitutionality of Section 85501, not the constitutionality of any other laws under the Act pertaining to candidates.

⁶ The Act requires all candidates to file periodic reports disclosing contributions received and expenditures made in connection with elections. (Sections 84200 et seq.)

⁷ We note that as a general rule, local jurisdictions are permitted to impose additional requirements provided the requirements do not prevent a person from complying with the Act. (Section 81013.) Also, where the provisions of local law do not conflict with the Act, the local law will not be superseded. (*Riddle* Advice Letter, No. A-88-409.) However, as indicated, we can express no opinion as to San Jose’s interpretation of its local ordinance because Commission has no jurisdiction beyond the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:dkv